In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC.,

Petitioners,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association; GOLDEN GATE RESTAURANT ASSOCIATION, a corporation; and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondents Hotel Employers Association of San Francisco and Golden Gate Restaurant Association in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit (Petition, Appendix A) is reported at 542 F.2d 1076; the Order of the Court of Appeals denying a rehearing and

1. Each of the three Respondents submitted separate memo-

rejecting the suggestion for a rehearing in banc (Petition, Appendix D) is unpublished. The Memorandum of Opinion of the District Court (Petition, Appendix B) is reported at 1973-1 Trade Cases ¶ 74,513. The Supplemental Order of the District Court (Petition, Appendix C) is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[2]

1. Whether allegations that Respondents opposed Petitioners' applications for restaurant permits at public hearings before the San Francisco Board of Permit Appeals are sufficient to state a claim for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, when accompanied only by conclusory allegations that such opposition was baseless, sham, frivolous and intended to foreclose Petitioners from free and unlimited access to said Board.

2. Whether the Court of Appeals erred in holding that Petitioners' complaint, based upon allegations of conduct *prima facie* protected by the First Amendment, must contain more specific allegations than would otherwise be required.

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randa and briefs in the courts below and, to some extent, raised different arguments. For the convenience of the Court, however, Respondents Hotel Employers Association of San Francisco and Golden Gate Restaurant Association join in this consolidated Brief in Opposition.

2. The questions which Petitioners purport to present for review by this Court do not accurately reflect the allegations of the Amended Complaint and the rulings of the courts below. Respondents respectfully submit that the questions set forth above more accurately describe the issues presented by the record.

STATUTES, RULES AND CHARTER PROVISIONS INVOLVED

The pertinent provisions of Section 1 of the Sherman Act, 15 U.S.C. § 1, and of Rule 8 of the Federal Rules of Civil Procedure are set forth in the Petition at pages 3-4.

Also involved in this case is Section 3.651 of the Charter of the City and County of San Francisco, setting forth the procedures governing review by the San Francisco Board of Permit Appeals:

> ". . . [*A*]*ny person who deems that his interests or property or that the general public interest will be adversely affected as a result of operations authorized by or under any permit or license granted or issued by any department may appeal to the board of permit appeals.* Such board shall hear the applicant, the permitholder, *or other interested parties,* as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of the same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused." (Emphasis added.)

STATEMENT OF THE CASE

The Amended Complaint[3] alleges that Respondents appeared at public hearings during 1971 and successfully

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3. The original Complaint (Petition, App. E) was superseded by an Amended Complaint filed on February 26, 1973, which differed from the original Complaint only in the amendment of Paragraph 5 thereof and the addition of a new Paragraph 6 to reflect the separate identities of Respondents Golden Gate Restaurant Association and the Hotel Employers Association of San Francisco. Paragraph 6 of the original Complaint and all succeeding paragraphs were renumbered to reflect this change. References in this Brief and in the opinions below are to the paragraph numbers used in the Amended Complaint.

opposed certain applications by Petitioners for permits to build restaurants in San Francisco. As a result, Petitioners filed this $11,100,000 antitrust action against Respondents—an association of labor organizations, an association of restaurant owners and an association of hotel owners. Four years later, the lawsuit has not yet reached a conclusion and Respondents, despite the expenditure of considerable amounts of time and legal resources, are still threatened by the pendency of this action under a complaint resting, in essence, solely upon their alleged public appearances plus the allegation, in the most conclusory of terms, that such appearances and opposition were baseless, sham, frivolous and intended to foreclose Petitioners from access to the Board of Permit Appeals.

As the Court of Appeals recognized, the Board of Permit Appeals operates under an extremely broad mandate authorizing it to grant or refuse permits on the basis of "the general public interest" or of effects upon the "interests or property" of "any person"; there is virtually no restriction upon the persons entitled to be heard or the types of argument which may be advanced before the Board. (Section 3.651, Charter of the City and County of San Francisco,[4] discussed by the Court of Appeals at Petition, App. A, pp. 4-5) Proceedings before the Board are not conducted as simple two-party adversary adjudications limited to questions of compliance with local code requirements; they are open, public hearings at which political, economic, sociological, aesthetic and other positions may be (and frequently are) advanced. Such proceedings partake, in the words of the Court of Appeals, of all "the rough and tumble of the political arena." (Petition, App. A, p. 5)

4. Section 3.651, quoted in pertinent part above, broadly provides that any interested party may appear at hearings before the Board of Permit Appeals and that the issues to be considered at such hearings include matters affecting particular private interests as well as matters affecting the public interest.

The real nature of the controversy underlying this action is suggested in Paragraph 9 of the Amended Complaint, where it is alleged that Petitioners' employees *are not union members.* This controversy is, at its core, simply a dispute between labor unions and a non-union employer.[5]

The District Court, holding that the activities alleged in the Amended Complaint "constitute a textbook example of the type of activities protected by the First Amendment from antitrust liability" under *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), dismissed the Amended Complaint as to each Respondent for failure to state a claim upon which relief could be granted. (Petition, App. B)

After entry of judgment, Petitioners moved to set aside the judgment and for leave to file a *second* amended Complaint. After a hearing, both motions were denied. (Petition, App. C)

The judgment of dismissal was affirmed by the Court of Appeals, which held (a) that Respondents' activities, under applicable pleading standards, were immune from antitrust attack, and (b) that the District Court did not abuse its discretion in denying leave to amend. (Petition, App. A) A petition for rehearing and a suggestion for a rehearing in banc were denied and rejected, respectively, on November 2, 1976; *no judge of the Court of Appeals requested a vote on the suggestion for rehearing in banc.* (Petition, App. D)

5. This conclusion is reinforced by Petitioners' attempts, in their proposed Second Amended Complaint (see discussion in Section IV, below), to inject additional allegations concerning picketing, institution of proceedings before the California Labor Law Enforcement Division and the like.

REASONS FOR DENYING THE WRIT

I. The Courts Below Properly Interpreted and Applied This Court's Prior Decisions.

In recent years, this Court has turned its attention on four separate occasions to the question of the extent to which the exercise of First Amendment rights of petition, including attempts to influence the passage or enforcement of laws, are immune from antitrust liability. The resulting series of opinions has clearly delineated the contours of this immunity, and the implications of those opinions for the present case were clearly and correctly perceived by the courts below.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), arising out of a lobbying and public relations campaign by railroads seeking the adoption and enforcement of legislation restricting the trucking industry, this Court held, as a matter of statutory construction, that the Sherman Act does not apply to "mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138. The Court noted in dictum, however, that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" and would therefore justifiably be subject to the Sherman Act. 365 U.S. at 144. Despite allegations of anticompetitive intent, misrepresentations and other activities going beyond mere attempts to influence legislation, the Court found no reason to doubt that the railroads were making a genuine effort to obtain governmental action.

Four years later, in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), this Court reaffirmed

the *Noerr* principle that "a concerted effort to influence public officials [is immune from the Sherman Act] *regardless of intent or purpose*," and held further that such concerted efforts are not illegal even "as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670 (emphasis added).

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this Court resolved an area of uncertainty under *Noerr-Pennington* by holding that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government." 404 U.S. at 510. The Court also indicated that the *Noerr-Pennington* doctrine has First Amendment roots:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." 404 U.S. at 510-11.

After articulating these principles, the Court in *Trucking Unlimited* went on to elaborate upon the so-called "sham" exception to the *Noerr-Pennington* principle. The complaint in *Trucking Unlimited* included specific allegations that the defendants had instituted or appeared in administrative and judicial proceedings at every opportunity, regardless of the merits; had established a joint trust fund to finance such appearances; and had publicized this program to plaintiffs and others similarly situated. 404 U.S. at 518 (Stewart, J., concurring in the judgment). Based upon these specific and detailed allegations (404 U.S. at 511),

and upon further allegations that the purpose and intent of the alleged activity was to bar plaintiffs "from meaningful access to adjudicatory tribunals," the Court held that the allegations of the complaint fell within the "sham" exception to *Noerr-Pennington* as adapted to adjudicatory processes. 404 U.S. at 516.

The most recent case in this series is *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), opinion on remand, 360 F.Supp. 451 (D. Minn. 1973), summarily affirmed, 417 U.S. 901 (1974).[6] *Otter Tail* involved allegations of a wide range of anticompetitive conduct; the pertinent allegations for present purposes were that Otter Tail, in an effort to stifle the growth of municipally-owned utility systems within its service area, had adopted a policy of instituting or sponsoring litigation *which, by its very existence, made it impossible for the municipalities in question to market electric revenue bonds to finance their proposed power systems.* The possibility of success on the merits was not a significant factor in Otter Tail's decision to institute litigation, and in fact Otter Tail was unsuccessful in every lawsuit which it brought. 410 U.S. at 379, n.9. The District Court judgment for plaintiffs in *Otter Tail I* had been issued prior to *Trucking Unlimited* and had been based upon the assumption that *Noerr* principles were inapplicable to judicial proceedings; on this phase of the case, the Court simply remanded for reconsideration in light of *Trucking Unlimited*. 410 U.S. at 380.

Petitioners have contended throughout the proceedings in this case that the allegations of their complaint are

6. Petitioners fail to note the summary nature of this Court's affirmance in *Otter Tail II* (Petition, p. 13), and the limited precedential value which attaches to such an affirmance. See *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

sufficient to bring them within the "sham" exception to the *Noerr-Pennington* doctrine. Both of the courts below correctly perceived, however, that the facts alleged in this case bear not even a remote resemblance to the activities at issue in *Trucking Unlimited* and *Otter Tail;* instead, the facts alleged herein fall clearly within the zone of protected activities under the principles of *Noerr, Pennington* and *Trucking Unlimited*.[7]

In the first place, as the Court of Appeals recognized, proceedings before the Board of Permit Appeals in San Francisco partake more of "the rough and tumble of the political arena" than of the niceties of a highly structured judicial or administrative proceeding; in this regard, the court said, "we seriously doubt that any argument raised before the Board could be . . . characterized [as 'sham' or 'frivolous'] in view of the extremely broad standards governing the exercise of that body's discretion." (Petition, App. A, p. 4) Even if one assumes, however, that the complaint herein should be tested against the standards applicable to adjudicatory proceedings rather than legislative ones, there are many substantial distinctions to be drawn between the conduct constituting a "sham" in *Trucking Unlimited* and *Otter Tail* and the conduct alleged by Petitioners.

In this connection, it is instructive to look not only at what the complaint herein alleges, but at what it does *not*

7. Petitioners wholly misconstrue the opinion of the Court of Appeals in arguing that that opinion would require allegations that threats were communicated as part of a plan to deny access. (Petition, at 17) In fact, the Court of Appeals held only that activities external to *or abusive of* legislative, administrative or judicial processes, including (but not limited to) threats of opposition, *may* be a factor leading to the destruction of *Noerr*-type immunity. (Petition, App. A, pp. 10-11, n.4) As such, the holding of the Court of Appeals is squarely in line with this Court's prior decisions.

allege. The complaint does *not* allege that any of the Respondents compete with McDonald's; it does *not* allege that Respondents *initiated* any of the proceedings before the Board of Permit Appeals; it does *not* allege that Respondents' alleged conspiracy was *jointly financed*, or that it was financed at all (there is no allegation that attorneys for any of the parties herein were present at any of the hearings); it does *not* allege how *frequently* (if at all) each of the Respondents appeared before the Board, or what the *duration* or *content* of those appearances might have been; it does *not* allege that Respondents threatened to oppose each and every application which might be made in the future; it does *not* allege that McDonald's was *in fact* deterred or inhibited from continuing to seek restaurant permits, or that McDonald's was in any way denied the opportunity to make a full presentation of its position to the Board. (Even if such an allegation were made, it is wholly implausible to suggest that a large corporation with the size and resources of McDonald's could readily be deterred by such opposition.)

Finally, the complaint does not allege (because it *cannot* allege) that Respondents were unsuccessful in their efforts. In *Otter Tail,* the defendant's consistent lack of success on the merits clearly permitted the inference that the defendant was engaged in just the type of "pattern of baseless, repetitive claims" condemned in *Trucking Unlimited* (404 U.S. at 513). Where, as in the instant case, a defendant has instead met with uniform success in its opposition on the merits, such success compels the inference that such opposition was both genuine and meritorious. (Petition, App.A, p. 5; *cf. Noerr,* 365 U.S. at 144-45.)

The Court of Appeals accurately perceived that the present case is, in one sense, a "through the looking glass" version of *Otter Tail*:

> "In [*Otter Tail*], whenever a community sought to go into the power business, Otter Tail sued. The effect of the mere filing of the action destroyed the community's ability to proceed. Nobody would buy its bonds while the action was pending. Mere filing was enough to accomplish Otter Tail's purpose. In our case, that is not so. Mere opposition would not defeat McDonald's purpose; to do that, defendants had to persuade the Board to rule in their favor—and it is alleged that they succeeded. The only bit of *in terrorem* litigation here is McDonald's action, an avowed purpose of which is to eliminate opposition, even the defendants' successful opposition, to its desires before the Board." Petition, App. A, pp. 17-18.

The position for which Petitioners contend (a position wisely rejected by the courts below) would permit an unscrupulous entrepreneur, by the filing of lawsuits based upon the most conclusory allegations of "denial of access" and the like, to deter or intimidate members of the public and competing businessmen alike from raising any opposition before public tribunals by imposing heavy litigation expenses and threats of liability for damages upon those who have the temerity to exercise their First Amendment rights in the form of legitimate appearances before public bodies. This Court's prior decisions clearly protect First Amendment rights in such circumstances. In the words of the Court of Appeals:

> "This action is, in essence, an improper attempt to chill, indeed to prevent, the exercise of First Amendment rights. It was properly nipped in the bud by the trial judge." (Petition, App. A, p. 20)

II. The Decision Below Does Not Conflict with Any of the Other Court of Appeals Decisions Cited by Petitioners.

Petitioners, in a vain effort to demonstrate some basis for review by this Court, suggest that the opinion below conflicts with decisions of the Courts of Appeals of several circuits. (Petition, pp. 20-21) A review of the cases relied upon by Petitioners, however, discloses that none of them conflicts in any respect with the principles discussed and applied by the court below. By lifting certain quotations out of context and ignoring their factual underpinnings, Petitioners have simply attempted to create the illusion of conflict.

Petitioners have relied, throughout these proceedings, upon *Harman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964), involving allegations that the defendants had induced the Arizona Attorney General to initiate an action to place a savings and loan institution in receivership. Petitioners fail to mention that in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), the Ninth Circuit itself characterized the authority of *Harman* as having been "eroded" and "lessen[ed]" by *Pennington.* (420 F.2d at 342) *Sun Valley* arose out of a dispute over the granting of an exclusive garbage collection franchise by the Board of County Commissioners. Affirming dismissal of the complaint on *Noerr-Pennington* grounds, the Ninth Circuit noted that this appeared to be simply an instance of "valid municipal action . . . without the scope of the federal antitrust laws" (420 F.2d at 342), and that in any event the Sherman Act was not intended to regulate the effects of personal interest and outside influences upon the actions of local governmental units such as city councils and county boards (*id.*):

> "A plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case." 420 F.2d at 343.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975), one of the alleged conflicts cited by Petitioners, is similar in many respects to *Sun Valley*; moreover, Petitioners concede that the quotation from *Metro Cable* upon which they rely is mere dictum (Petition, p.21). Plaintiff in *Metro Cable* was an unsuccessful applicant for a cable television franchise in Rockford, Illinois; defendants, the successful applicants, were alleged to have conspired with the mayor and with an alderman to induce the city council both to deny the requested franchise to plaintiff and even to deny hearings on plaintiff's applications. The Court of Appeals, in affirming dismissal of the complaint on *Noerr-Pennington* grounds, noted in dictum that certain abuses of adjudicative processes may be illegal under the antitrust laws, 516 F.2d at 228. The court went on to conclude, however, that *the granting of a cable television franchise was a legislative act by the city council and occurred in a political setting*—the council was open to arguments from any source, was not obliged to compile a formal evidentiary record and was unquestionably subject to lobbying and political influence. *Id.* Under such circumstances, the court found the bare allegation that the mayor and alderman were conspirators to be irrelevant,[8] as was the

8. Petitioners, citing *Harman,* point to an allegation "that defendants *may have* acted in concert with the Board (other than its President)." (Petition, p. 16; emphasis added.) The complaint contains no other allegation of any participation by Board members in the alleged conspiracy. Such vague innuendo is patently insufficient to justify any reliance upon cases alleging official participation in a conspiracy (assuming, for the moment, that such cases have any vitality after *Sun Valley* and *Metro Cable*).

allegation that defendants obtained the support of city officials by making campaign contributions. 516 F.2d at 229-31. Finally, the court noted that the injury alleged by plaintiff was caused by precisely the governmental actions which defendants had *genuinely* and *successfully* sought to induce the city council to take. 516 F.2d at 229. If anything, *Metro Cable supports* the decision below.

Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. den'd* 404 U.S. 1047 (1972), arose out of a dispute over natural gas production quotas. The complaint alleged in part that defendants were filing false production forecasts for use by the Texas Railroad Commission in establishing quotas for certain fields. The Court of Appeals, in reversing a grant of partial summary judgment, held that the filing of false *factual* data is very different in kind and in effect from the making of misleading or exaggerated *arguments*; the latter constitutes a form of advocacy clearly protected under *Noerr* and its progeny, while the former constitutes a serious abuse of the administrative process and enjoys no such immunity. 438 F.2d at 1294-95. Nowhere does the complaint herein allege any such factual misrepresentations by Respondents.

Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) is clearly distinguishable on similar grounds. The complaint in *Israel* alleged a conspiracy to keep plaintiffs' drug Cothyrobal from the market by influencing the Food and Drug Administration (FDA) to deny fair consideration to plaintiffs' new drug applications. Among the activities allegedly engaged in by defendants in *Israel* were the suppression, concealment and misconstruction of information concerning Cothyrobal and a competing drug then before the FDA; for the same reasons set forth in *Woods,*

such tampering with the factual processes of an administrative body cannot be countenanced.[9] The present case, however, contains no allegations of such tampering.[10]

In short, even if the Board of Permit Appeals were regarded as an administrative agency committed to "fair and impartial functioning" on the basis of a detailed factual record, the allegations in the instant case are not sufficient to bring Petitioners within the reasoning of *Woods* and *Israel,* and given the wide-open and political nature of the proceedings before the Board of Permit Appeals, there is substantial doubt that such cases can be regarded as relevant precedent in any event.

The final alleged conflict cited by Petitioners is *Semke v. Enid Automobile Dealers Assn.,* 456 F.2d 1361 (10th Cir. 1972)—again, Petitioners concede that their quotation from *Semke* is mere dictum (Petition, p. 21). Defendants in *Semke* were alleged to have persuaded the Oklahoma Motor Vehicle Commission to seek and obtain an injunction, subsequently affirmed by the Oklahoma Supreme Court, against certain car-purchasing services provided by plaintiff. The Court of Appeals noted in dictum that misuse or corruption of legal processes would not be immune under *Noerr-Pennington.* 456 F.2d at 1366. The court went on to state, however, that "the utilization of the court or administrative agency in a manner which is in accordance with the spirit of the law continues to be exempt from the antitrust laws,"

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9. It is significant to note that the remedy adopted by the court in *Israel* was, in part, to remand so that plaintiffs could reactivate their applications for further consideration by the FDA. No such remedy is called for in the instant case, since there is no contention that the Board of Permit Appeals gave less than full consideration to Petitioners' applications.

10. *Israel,* like *Metro Cable* and *Harman,* included allegations that a government official conspired with the defendants. No such factor is present here. See discussion in note 8, *supra.*

and held that the facts in *Semke* showed simply that defendants had used state processes in precisely the manner in which such processes were intended to be used. 456 F.2d at 1366-67.

In summary, a review of the Court of Appeals decisions relied upon by Petitioners demonstrates no conflict at all, but rather a substantial consistency and uniformity in the interpretation of this Court's decisions and in their application to various types of governmental processes.

III. The Pleading Standards Applied by the Court of Appeals Are Neither "Special" Nor Unique, and Are Amply Supported by Precedent.

The Court of Appeals held, in part, "that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." (Petition, App. A, p. 13) For the reasons demonstrated in Section IV, *infra*, this holding is not essential to the resolution of this case—the complaint is deficient under any pleading standard. Nevertheless, the standard articulated by the Court of Appeals is not by any means the "radical departure" which Petitioners suggest.

Courts in recent years have shown an increasing sensitivity to the substantial burdens which can be thrust upon defendants by the combination of liberal pleading rules and liberal discovery policies. See, *e.g., Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 739-41 (1975), quoted in the opinion below at Petition, App. A, pp. 14-16; *National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice,* 70 F.R.D. 79 (1976); Petition, App. A, pp. 20-21 (Markey, J., concurring). Under such circumstances, the requirement that a complaint based upon activities involving the exercise of First Amendment rights set forth the basis for relief with greater than usual specificity is but a reasonable compromise between the notice pleading policy of the Federal Rules and the "breathing space" necessary to protect First Amendment freedoms.

Decisions of this Court in substantive areas such as invasion of privacy, libel and other fields of state regulation which touch upon First Amendment freedoms have long shown a sensitivity to the need for making such accommodations. See, *e.g., Time, Inc. v. Hill,* 385 U.S. 374 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). Similarly, numerous decisions in the Fifth Circuit have recognized that the protection of First Amendment freedoms requires an increased sensitivity in dealing with the assertion of long-arm jurisdiction over out-of-state defendants in libel actions: "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *New York Times Co. v. Connor,* 365 F.2d 567, 572(5th Cir. 1966); *Edwards v. Associated Press,* 512 F.2d 258, 266-68 (5th Cir. 1975). See also *United States v. Lattimore,* 127 F.Supp. 405, 407 (D.C.D.C. 1955), applying "exacting scrutiny" to the sufficiency of an indictment based upon activities in the First Amendment area.

A similar trend can be discerned in the application of pleading principles in actions brought under 42 U.S.C.

§ 1983 and other civil rights statutes. Recognizing the increasing volume of such suits and the potential which they offer for harassment or intimidation of state officials, courts have shown a significant willingness to look beyond conclusory allegations of intentional or wilful conduct, racial discrimination, conspiracy or arbitrary denial of access to the courts, and to require that a plaintiff present more specific factual allegations in support of such conclusions. See, *e.g., Ogletree v. McNamara,* 449 F.2d 93, 98 (6th Cir. 1971) ("Liberal as are the federal rules of pleading, something more than conclusory allegation of systematic racial discrimination is required. Some facts as to when, how, to whom and with what results such discrimination has been applied would seem a minimum required for 'a short and plain statement of the grounds upon which the court's jurisdiction depends.' "); *Curtis v. Everette,* 489 F.2d 516, 521 (3d Cir. 1973), *cert den'd* 416 U.S. 995 (1974) ("This court has repeatedly held that conclusory allegations, such as 'intentionally, wilfully and recklessly,' without supporting facts are not sufficient to make out a complaint under 42 U.S.C. § 1983."); *Guedry v. Ford,* 431 F.2d 660, 664 (5th Cir. 1970) ("Plaintiff's allegation that a conspiracy existed between all the captioned defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief."); *Finley v. Rittenhouse,* 416 F.2d 1186, 1187 (9th Cir. 1969); *United States ex rel. Hoge v. Bolsinger,* 311 F.2d 215, 216 (3d Cir. 1962), *cert den'd* 372 U.S. 931 (1963). These cases illustrate that where significant rights of the defendant or important concerns of judicial administration are involved, courts will require something more than the barest, conclusory "notice pleading" of the plaintiff's claim.

When viewed in the context of such precedents, the holding of the Court of Appeals is seen to be neither novel nor unsupported.[11]

IV. Even Under the Most Liberal Construction of the Pleadings, the Complaint Fails to State a Claim.

The only specific activities alleged in the Amended Complaint are a series of appearances at public hearings, the solicitation of similar appearances by others and the threatening of withdrawal of political support from Board members. Joined with these allegations of specific conduct are conclusory allegations that such activities were performed baselessly, with anticompetitive intent, and with the intent to deny Petitioners access to the Board.

Cases such as *Ogletree, Curtis* and *Guedry,* cited in the preceding section, provide ample authority for disregarding such conclusory allegations in evaluating the sufficiency of a complaint, even under ordinary pleading standards which take no account of the involvement of First Amendment rights. For this reason, the present case provides an inadequate vehicle for reaching the First Amendment pleading issue presented by Petitioners.

Petitioners' arguments concerning the sufficiency of the Amended Complaint, and their efforts to convince this Court to review that complaint under *Noerr-Pennington*

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11. *Hospital Building Co. v. Trustees of Rex Hospital,* ..... U.S. ....., 98 S.Ct. 1848 (1976), cited by Petitioners, is not to the contrary. *Rex Hospital* was a straightforward antitrust case without First Amendment overtones. Moreover, the issue at stake in *Rex Hospital* (effects upon interstate commerce) is one as to which Congress intended to give the Sherman Act the broadest possible scope. *Cf. United States v. South-Eastern Underwriters' Assn.,* 322 U.S. 533, 557-59 (1944). *Noerr* itself is ample evidence that no such Congressional policy is to be inferred where First Amendment rights are involved.

standards, are further complicated by facile references to the "proposed second amended complaint" (Petition, pp. 6, 16 and App. F) as if the provisions of that version of the complaint were properly before this Court. In fact, the District Court denied Petitioners' motion for leave to file a Second Amended Complaint (Petition, App. C) and the Court of Appeals held that the District Court had not abused its discretion in so doing.[12] (Petition, App. A, pp. 18-20) Both courts reviewed Petitioners' proposed amendments and concluded that they added nothing of value or substance to the allegations of the Amended Complaint. Moreover, Petitioners have not chosen to raise the propriety of the District Court's denial of leave to amend among their Questions Presented. Again, this muddying of the waters by Petitioners makes the case an unsatisfactory vehicle for review of the issues resolved below.

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12. The District Court's denial of leave to amend was supported in part by the following colloquy, which took place between petitioners' counsel and the District Court at the oral argument on Respondents' motions to dismiss on April 27, 1973:

> THE COURT: In the event that I do rule in favor of the moving parties, do you feel you could amend your complaint or do you want to take a straight shot on appeal?
>
> MR. BLECHER: I would like to consult with my clients about it. *My own reaction would be we can't state it any better than we stated it this time.*

(I R.T. at 23-24; emphasis added.) On the basis of this colloquy, it was clearly proper for the courts below to assume that Petitioners had no valid basis for further amendment, and to view with suspicion any subsequent effort to inject additional elements into the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

DATED: February 23, 1977.

Respectfully submitted,

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